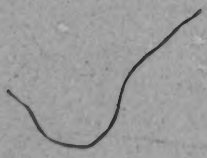

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

NO. 73-6336

GEORGE HERMAN ROGERS,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

REPLY BRIEF

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I.

Privilege of Reply

WE RESPECTFULLY SUBMIT THAT WHEN THE ULTIMATE DECISION IN A GIVEN CASE WILL HAVE FAR REACHING CONSEQUENCES BEARING UPON FIRST AMENDMENT FREEDOMS, THE RIGHT, NAY, THE DUTY EXISTS TO CLARIFY THE ISSUES BEFORE THE COURT, AS WELL AS THE ARGUMENTS OF THE PARTIES.

Rule 41.3 of the Supreme Court Rules acknowledges that the Court will accept reply briefs "up to three

days before the case is called for hearing. . . ." The form of the brief is set forth in U.S. Sup. Ct. Rule 40.4, 28 U.S.C.A. The acceptability of the brief is determined by the exercise of the Court's wise discretion, with due regard for the circumstances of the case, applicable laws, and the rules of evidence. The scope and content of the brief are therefore inappropriate subjects for express Supreme Court Rules, and in anticipation of an objection from opposing counsel, we note the following analogous rules and prior statements of the Court.

The brief must be relevant to the consideration of the cause and not burden the Court with undue repetition or mere restatement of arguments fully and adequately presented in the brief in chief.[1] If a party intends to supplement his brief in chief, the additional material must conform to U.S. Sup. Ct. Rule 41.5, 28 U.S.C.A.[2] Principally, the privilege of reply should be exercised to address itself to important arguments first raised in the brief of the opposition.[3] The new

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[1]"Briefs must be compact, . . . and free from burdensome, irrelevant, immaterial . . . matter. Briefs not complying with this paragraph may be disregarded and stricken by the Court." U.S. Sup. Ct. Rule 40.5, 28 U.S.C.A.

[2]U.S. Sup. Ct. Rule 41.5, 28 U.S.C.A. reads in pertinent part: "Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, ..."

[3]"Reply briefs addressed to arguments first raised in the briefs of opposition. . . ." U.S. Sup. Ct. Rule 24.4, 28 U.S.C.A.

arguments may be the product of the skill and effort of opposing counsel, the result of an oversight on the part of petitioner's counsel, or due to a misunderstanding of the import of petitioner's brief in chief.

Finally, guided by the above rules of Court, the reply brief must be viewed in light of the nature of the cause, with due regard for the role of the parties, and the purpose and effect of the proceedings. When matters of great public concern are at issue, such as an apparent confrontation between an individual's right of freedom of expression and the right of the government to protect its Chief Executive, strict rules of judicial brevity must not be inflexible to the demand for clarifying erudition. *Duignan v. United States*, 274 U.S. 195, 47 Sup. Ct. 566 (1927). The necessity for clarification closely attends the need to correctly decide a case which will have far reaching consequences, and is paramount when there exists a substantial likelihood that an improper decision would have a "chilling effect" on the exercise of first amendment freedoms. Cf. *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 Sup. Ct. 817 (1938); *Terminiello v. City of Chicago*, 337 U.S. 1, 69 Sup. Ct. 894 (1949). In such cases "rules of practice" denying standing to raise another's rights must give way to "weighty countervailing policies." *Thornhill v. State of Alabama*, 310 U.S. 88, 60 Sup. Ct. 736 (1940); *Barrows v. Jackson*, 364 U.S. 249, 73 Sup. Ct. 1031 (1953); *United States v. Raines*, 362 U.S. 17, 80 Sup. Ct. 519 (1960). See also *Gooding v. Wilson*, 405 U.S. 518, 92 Sup. Ct. 1103 (1972), and the cases cited at 92 Sup. Ct. 1105. Similar considerations have motivated the Court to even grant reargument on constitutional questions not raised by the parties. See

United States v. O'Brien, 391 U.S. 367, 88 Sup. Ct. 1673 (1968) and cases cited at 88 Sup. Ct. 1686 (Douglas J., dissenting). Certainly, clarification seems most appropriate prior to the submission of the case and when the parties and circumstances before the Court are such as will sharpen the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 82 Sup. Ct. 691 (1962).

Subject to the above pronouncements of this Court, we respectfully submit the text of this brief for consideration.

II.

Questions Presented

WE RESPECTFULLY SUBMIT THAT THE DETERMINATIVE QUESTIONS ARE FAIRLY COMPRISED WITHIN THE "QUESTIONS PRESENTED" IN PETITIONER'S BRIEF IN CHIEF.

In the briefs in chief, both parties sought the same objectives—to narrow the issues before the Court and to reverse a patently unjust conviction.[4] The difficulties experienced in determining the proper means to obtain these laudable objectives were noted by both parties.[5] Indeed, with the keenest perception the United States noted the thorny issues presented by the many "factors

[4]See (a) "Questions Presented": Pet. brief, p. 2; U.S. brief, p. 2. (b) "Conclusion": Pet. brief, p. 52; U.S. brief, p. 3_.

[5](a) Pet. brief, p. 10-12. (b) U.S. brief, p. 11, 26-27.

of this case"[6], and with a subtle intimation of surprise suggested that none of these questions had been recognized or raised by petitioner.[7] Somewhat inconsistently they then offer a single, narrow formulation in replace of our five.

Perhaps at the invitation of the United States we should now make another attempt to reformulate the issues. However, we must decline the offer for fear that our efforts would appear more in the nature of restatement or reargument than clarification. In so doing we respectfully submit that the determinative questions are, to the best of our ability, fairly comprised within our earlier formulations.[8]

III.

Introduction

Petitioner certainly recognizes the dangers of miscommunication inherent in the written or verbal expression of a viewpoint. Indeed, opposing counsel's difficulty in discerning the significance of petitioner's statements (in the brief in chief) to the thorny issues presented is apt illustration of our misunderstood argument. The inability of the speaker, the beliefs and prejudices of

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[6]U.S. brief, p. 27.

[7]U.S. brief, p. 5 (nt. 5), p. 7 (nt. 7); p. 27 (nt. 28); and nt. 4, supra.

[8]"* * * *. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." U.S. Sup. Ct. Rule 40.1 (d)(1).

the listener, and the circumstances of the communication all tend to distort the substance of the message conveyed.

Noting opposing counsel's well-founded apprehension that petitioner's argument had been misunderstood[9], we direct Part I of this reply towards clarification of our own arguments. For it was the lack of communication which led the government to assert that petitioner would require proof of "specific intent to execute the threat (as) an element of the offense."[10] Inevitably this misunderstanding resulted in an attempt to reformulate petitioner's five questions in a single question, casting petitioner in the unenviable and absurd position of apparently arguing that "success alone warrants making the act a crime."[11] Hopefully this reply will make it quite clear that petitioner has never espoused such an untenable position.[12]

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[9]U.S. brief, p. 10.

[10]U.S. brief, p. 13, 20.

[11]*Schenck v. United States,* 249 U.S. 47, 39 Sup. Ct. 247, 294 (1919).

[12]We note that the import of petitioner's brief in chief was more correctly perceived by the United States in what it chose to ignore rather than in what it chose to consider. The following is found at U.S. brief, p. 26:

> "While petitioner's remarks taken in context may raise a question whether they could objectively be considered serious, if that question is answered in the negative, the remarks constituted a form of speech (utterance) that Congress simply did not proscribe in Section 871(a) . . .", (either facially, as authoritatively construed by *Ragansky v. United States,* 253 F. 643 (7th Cir. 1918) and *Watts v. United States,* 394 U.S. 705, 89 Sup. Ct. 1399 (1969), or

Part II of this reply will be directed towards the beliefs, fears and prejudices of the readers of petitioner's brief in chief. Certainly the miscommunication is no less due to the preconceptions of the prosecuting counsels, than to our own inabilities to make ourselves understood. We are told that even if the activity engaged in by petitioner was merely the expression of a thought, he can be punished without considering the "intent of the speaker in making the utterance"[13] or "(its) actual affect in a given case."[14] We respectfully submit that this approach (test) is the result of:

1. An "undifferentiated fear or apprehension" of evil[15];
2. A comical imputation to the First Amendment of a snobbish preference for the sophisticated

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as applied to that "form of speech" in the immediate proceedings.)

Continuing in a footnote, the United States ignores petitioner's two (2) years in jail, and declares:

> "It is unnecessary to consider whether Congress could constitutionally punish a(n) (objectively) non-serious declaration of intent to kill the President. It has not done so. We note, however, that resolution of the question would depend on the extent to which there are constitutional limitations on the legislative powers substantively to define crime."

[13]U.S. brief, p. 25.

[14]U.S. brief, p 22.

[15]*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 Sup. Ct. 733, 737 (1969); *Cohen v. California*, 403 U.S. 15, 91 Sup. Ct. 1780, 1787 (1971).

type of utterances which "tend (more) to contribute to the climate of hate" surrounding the office of the President, and "thus to some (real) extent endanger the President's life" and freedom of movement;[16]

3. An unrealistic attribution of talismanic qualities to the statutory term "threat", based on the belief that despite the context, certain configurations of words "are no essential part of any exposition of ideas."[17]

4. An undeniable suggestion that "when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involves such danger of substantive evils that they may be punished, the question whether any specific utterance coming within the prohibitive class is likely, in

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[16]Compare: (1) U.S. brief, p. 19—"A declaration or announcement, for example, that the 'President must be killed and I will do it' may take on a different character when made during a political speech . . . although declarations of this sort may not be at the core of the First Amendment, they are at least on the periphery." with (2) "Many statements wholly protected against restriction by the First Amendment may 'tend' to contribute to the climate of hate which makes the free movement of the President dangerous. The affirmations of the affluent as well as the militant exhortations of the dispossessed may have this tendency. Many statements on political affairs may, by implications or through hyperbole, compass the violent end of the Chief Executive. The threat of punishment for all such statements would exert a chilling effect on political speech too drastic to be consistent with the guarantee of free expression." *Watts v. United States*, 402 F.2d 676 (1968), Wright, J., dissenting; reversed 394 U.S. 705, 89 Sup. Ct. 1399 (1969).

[17]*Chaplinsky v. New York*, 315 U.S. 568, 62 Sup. Ct. 766, 769 (1942).

and of itself, to bring about the substantive evil, is not open to consideration."[18]

In this part, then, we must review the facts of this case and analyze the basis for the United States' arguments. Then, recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging, yet barely visible encroachments," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 Sup. Ct. 631, 637 (1963), we must ask whether the *Ragansky–Roy Test*[19] embodies the "sensitive tools" required for the "separation of legitimate from illegitimate speech." *Speiser v. Randall*, 357 U.S. 513, 78 Sup. Ct. 1332, 1342 (1958).[20] We submit that it does not.

Finally, in Part III we direct our attention to the proper resolution of the issues presented herein. The United States concludes that petitioner's conviction should be reversed on the grounds that the District Court violated Rule 43, Fed. R. Cr. P.; and in a footnote, it is stated that "if petitioner's conviction is reversed, he will not be retried."[21] As court-appointed

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[18]*Gitlow v. New York*, 268 U.S. 670, 45 Sup. Ct. 625,631 (1925). *OVERRULED* in *Brandenberg v. Ohio*, 395 U.S. 444, 89 Sup. Ct. 1827 (1969).

[19]We note the government's conclusions at U.S. brief, p. 23: "The *Ragansky-Roy Test* embodied in the trial court's instruction properly avoids (unconstitutional application) by distinguishing a 'true threat' from constitutionally protected speech."

[20]*Paris Adult Theatre I v. Slaton*, 93 Sup. Ct. 2628, 2645 (1973), Brennan, J., dissenting.

[21]U.S. brief, p. 32.

counsel for petitioner, we could hardly refuse any effort on the part of the United States to reverse petitioner's conviction. However, we submit that the United States' conclusion is deficient in two vital respects.

First, the practical effect of such a holding would not adequately respond to the cry for justice in the case before us. A reversal on technical grounds, necessarily attended by the implication that petitioner was substantively guilty of the heinous offense of "threatening to do bodily injury or take the life of the President", would be most difficult for petitioner to explain to future employers, family members, or more distant members of the society to which petitioner must now return.[22] We are not able to restore the nearly two years petitioner has spent in jail, but we need not commit further transgression by making his reintegration into society more difficult than it will already be. Insofar as the government's suggestion relates to the present case, we should also note its self-serving character. Under 28 U.S.C. 2513, petitioner's right to damages for unjust conviction and imprisonment must, in part, be founded on allegation and proof that:

> "His conviction has been reversed or set aside on the grounds that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the Court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground

[22] See *Wieman v. Updegraff*, 344 U.S. 183, 73 Sup. Ct. 215, 218 (1952).

of innocence and unjust conviction." 28 U.S.C. 2513 (a)(1).

Certainly the holding suggested by the United States would not meet this prima facie requirement.

Secondly, we must consider the effect of a holding which would apparently affirm subsequent convictions, with the imposition of prison terms from three to five years, based on similar factual situations. In our brief in chief, we adopted an "as applied approach"[23] and defended petitioner against the broad assertion that he "might" intend to execute the act described by his utterances, he "might" incite others to harm the President, and he "might" interfere with the freedom of movement of the President or the performance of his duties. Obviously, the proof presented at trial would not support a finding that petitioner intended any of these harms, or that any of these results was likely to obtain. Under the normal criminal statute, the government could not sustain a conviction for attempt, let alone completion of the substantive crime.[24]

Now we have been called to defend against the broad assertion that utterances of a certain type endanger the President's life, to some extent, by diverting the attention of "those charged with protecting the President."[25] Although this argument was not raised at the appellate level and we find no discussion of it in

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[23]Petitioner's brief, p. 12.

[24]The evidence of a mens rea is the rule of, rather than the exception to, the principle of Anglo-American jurisprudence. *Dennis v. United States*, 341 U.S. 494, 71 Sup. Ct. 857, 862 (1951).

[25]U.S. brief, p. 15.

the reported decisions under Section 871 (a), we gave it careful consideration many months ago. As set forth in Part II, we submit that the necessary considerations which attend the drafting of a statute prohibiting the intentional interference with the performance of the duties of the Secret Service are legislative by nature. More importantly, the scant evidence before this Court would hardly support judicial recognition of a statutory purpose which was clearly not presented, and therefore not considered, at the time Section 871 became law. The United States' argument forebodes great harm to the President, but in fact, no such evidence was introduced at the trial. *Dennis v. United States*, 341 U.S. 494, 71 Sup. Ct. 857, 903 (1951), Douglas, J., dissenting.

At the time we drafted our application for writs and our brief in chief, we might have wholeheartedly subscribed to a decision narrowly interpreting our "as applied" argument. However, our understanding of the First Amendment, and the dangers inherent in permitting a single instance of arbitrary, authoritative selection of what viewpoints can and cannot be expressed and debated in a democratic society, have matured, if only by contrast to the understanding expressed in the United States' brief. Although infinitely better than the alternative grounds for reversal proposed by the United States, we respectfully submit that a decision applying the unarticulated "true threat" test of *Watts*, even if coupled with further affirmation of the Court's doubt as to the validity of the *Ragansky* Test, leaves all persons to guess just what the law really means to cover and fear of a wrong guess inevitably leads people to

forego the very rights the Constitution sought to protect above all others. *Speiser v. Randall*, supra.

We further submit that the clear and present danger test, offered for petitioner's protection in the immediate proceedings, is designed more for the protection of the individual rather than as a final safeguard for the "transcendent values." It has been well observed that "such a device is indistinguishable from the process of piecemeal ad hoc excision and does not meet the need to restructure a substantially overbroad (statutory test) in order to dissipate its chilling effect." *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 888. This Court's conclusions as to the evils attending such a process were summarized in *Dombrowski v. Pfister*, 380 U.S. 479, 85 Sup. Ct. 1116, 1121-1123 (1965), as follows:

> "The chilling effect upon the exercise of First Amendment rights may derive from the (threat) of prosecution, unaffected by the prospects of its success or failure. See *NAACP v. Button*, supra, 371 U.S., at 432-433, 83 Sup. Ct. at 337-338; cf. *Baggett v. Bullitt*, supra, 377 U.S., at 378, 379, 84 Sup. Ct., at 1326; *Bush v. New Orleans School Board*, D.C., 194 F. Supp. 182, 185; *Tugwell v. Bush*, 367 U.S. 907, 81 Sup. Ct. 1926, 6 L. Ed. 2d 1250; *Gremillion v. U.S.*, 367 U.S. 11, 82 Sup. Ct. 119.
>
> * * *
>
> "The area of proscribed conduct will be adequately defined and the deterrent effect of the statute contained within Constitutional limits only by authoritative construction sufficiently illuminating the contours of an otherwise vague prohibition. As we observed in *Baggett v. Bullitt*, supra, 377

> U.S., at 378. 84 Sup. Ct., at 1326, this cannot be satisfactorily done through a series of criminal prosecutions, dealing as they inevitably must, with only a narrow portion of the prohibition at any one time, and not contributing materially to articulation of (an acceptable) statutory standard.
>
> We believe that those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the statute piecemeal, with no likelihood of obviating similar uncertainty for others."

We respectfully submit that the questions raised by a case which is itself[26] dramatic proof of the overreaching and arbitrary scope of a federal statute are two-fold in nature. First, does the statute by its own language exhibit a potential for sweeping and improper application to activities which are protected by the First Amendment except in narrowly limited and well-defined sets of circumstances. *Gooding v. Wilson*, supra, 92 Sup. Ct., at p. 1103, and *Gooding*, supra, at 92 Sup. Ct., p. 1111 (Berger, Ch. J., dissenting). Second, is the statute susceptible of a narrowing construction which implements rather than rewrites the legislative intent, and preserves rather than diminishes the protected freedoms. As the government correctly noted at U.S. brief, p. 9: "the statute . . . should be interpreted to avoid any conflict with the First Amendment. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (Justice Brandeis, concurring)."

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[26]See *Coates v. Cincinnati*, 402 U.S. 611, 91 Sup. Ct. 1686, 1690 (Black, J.) and 91 Sup. Ct., at 1691 (White, J., dissenting); *Gooding v. Wilson*, supra, 92 Sup. Ct., at 1103, 1109-1111 (Berger, Ch. J., dissenting).

Certainly it is not petitioner's responsibility to rehabilitate the statute in question. However, after spending more than two years embroiled in the complexities of this case, it is impossible for us not to draw a few humble conclusions. We offer these conclusions in Part III, not as an argument, and certainly not as a last word, but only with the hope that our discussion might contribute in some small manner towards the Court's formulation of a rule of excision which is "sufficiently determinate and sufficiently protective." *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 890.

Argument

I.

WE RESPECTFULLY SUBMIT THAT 18 U.S.C. 871 (A), AS APPLIED HEREIN, VIOLATES BOTH THE FIRST AND FIFTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Adopting an "as applied" approach, our brief in chief analyzed the form of the indictment, the nature of the government's proof, and the jurisprudential history of Section 871 (a), against the commands of the First and Fifth Amendments, as interpreted by this Court under a multitude of circumstances. Perhaps clarification must once again begin with a discussion of the subject matter.

The facts leading to the arrest, conviction and imprisonment of petitioner were summarized at U.S.

brief, page 4, as follows: Petitioner, a chronic alcoholic, entered the dining area of the Holiday Inn on March 24, 1972, and "began acting in an odd manner, laughing boisterously and attempting to engage others in conversation. Upset over President Nixon and his upcoming trip to Peking, petitioner announced (an apparent) intention to go to Washington 'to whip Nixon's ass' or 'to kill him in order to save the United States.' Petitioner also indicated that he was Jesus Christ and that part of his misgivings about the President's impending trip to Peking stemmed . . . from his belief that the Chinese had a bomb only he was aware of, a bomb they might use on the people of this Country."

Obviously the motive of petitioner in making the utterances in question was his desire to communicate his thoughts to those whom he was addressing. The substance of those thoughts was certainly not unique. The muted rumblings of secret weapons to be used against this Country by the Communist nations has long preoccupied our people. Perhaps the better substantiated, and better articulated fears which motivated McCarthyism in the 1950's, produced the Domino Theory in the 1960's, and fosters, by simplification and hyperbole, the street rumor herein expressed, has merit in fact. However, since First Amendment guarantees have never been subject to a test of truth, especially one that puts the burden of truth on the speaker, *Speiser v. Randall*, 357 U.S. 513, 78 Sup. Ct. 1332 (1958), we will not enter that debate. Constitutional protection does not turn upon the "truth, popularity or social utility of the ideas and beliefs which are

offered." *NAACP v. Button*, 371 U.S. 415, 83 Sup. Ct. 328 (1963); cf. *New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710 721 (1964).

Furthermore, if the fear entertained by the speaker is the product of international politics, the President and his policies may well become the center of debate. We at once enter a field where "sharp differences arise" and where "the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 60 Sup. Ct. 900, 906 (1940). Additionally, if, in the speaker's opinion, the acts or omissions of the President endangers the speaker's political philosophy, or perhaps his very life, we can well expect that his criticism may not be voiced "with perfect good taste." *Bridges v. California*, 314 U.S. 252; 62 Sup. Ct. 190, 197 (1941). In the heat of the moment the speaker may well "resort to exaggeration, or to vilification of men who have been, or are, prominent in . . . state", *Cantwell v. Connecticut*, supra, 60 Sup. Ct., at page 906, his remarks may "include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials", *New York Times Company v. Sullivan*, supra, 84 Sup. Ct., at page 721, and, as a product of his own emotion, his language may often be "vituperative, abusive, and inexact", *Watts v. United States*, supra, 89 Sup. Ct., at page 667, or perhaps the words will even be chosen for their emotive as well as their cognitive force. *Cohen v. California*, 403 U.S. 15, 91 Sup. Ct. 1780, 1788 (1971). As Justice Frankfurter has said, "one of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the

freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 655, 64 Sup. 1240, 1245 (1944).

Perhaps at this juncture our analysis could have centered on the evidence as to the statements made in this case. We could have engaged in mental gymnastics in an attempt to determine whether petitioner's utterances, that he would personally whip the President's ass, were conditioned on his possessing the powers of Jesus Christ. Yet, to make the Constitutional freedoms turn upon whether the speaker, in the heat of the moment, conditioned his remarks with the word "ought" or "if", or by other accidental verbage, balances vital Constitutional rights against the least credulous of the possible evidence.

Also, perhaps we could have defended within the framework of the *Ragansky* test. It is difficult for us to understand how the "threats" can be singled out from all of petitioner's other statements as "serious expressions." Yet, if we take all of petitioner's statements seriously, the conclusion is inescapable that petitioner was not altogether present on the morning in question, an issue which the government resolved in favor of competency, as evidenced by the very fact of these proceedings. Nevertheless, using this approach and according equal weight to each of petitioner's statements would require a finding that petitioner's propensity for gross exaggeration extended on a single morning to a verbal reprimand of the President, and that such obvious hyperbole is not a "true threat" as required by *Watts v. United States*, supra. But once again, it was felt that individual rights would be

subjected to an improper test, a test of elocution and semantics, and that for our own lack of eloquence, "free expression–of transcendent value to all society, and not merely to those exercising their rights–might be the loser." *Dombrowski v. Pfister*, 380 U.S. 479, 85 Sup. Ct. 1116, 1121 (1965).

Recognizing that subjective arguments should not be made the arbiter of First Amendment freedoms, we turned to an evaluation of the objective standard formulated in *Ragansky v. United States*, 253 F. 643 (7th Cir. 1918). The jurisprudential history of Section 871 (a) was examined at Pet. brief, p. 29-34.

Briefly: The test was enunciated at a time when the statute was believed to have been enacted "not only for the protection of the President . . . (but, that) there might hereafter be a deterrent to restrain the disloyal, erratic, misguided, or wickedly disposed." *U.S. v. Stickrath*, 343 F. 151, (D.C. Ohio 1917). Cf. *U.S. v. Jasick*, 252 F. 931, 932 (D.C. Mich. 1918). (Today it is obvious the United States "lacks power to punish . . . the underlying content of the message conveyed", *Cohen v. California*, supra, 91 Sup. Ct. at p. 1785, "even though the opinion may be rejected by the overwhelming majority of the American people." *Yates v. United States*, 354 U.S. 316, 77 Sup. Ct. 1064, 1074 (1956). To compass and imagine the death of the king is not a crime in the United States in 1975. We need consider no other era, no other society, in reaching this conclusion.)

Further examination disclosed that the underlying fear which motivated this broad interpretation was the belief that ". . . an intention to give utterance to words . . . that is, the expression of a determination,

whether actual or only pretended, to menace the President's safety", *Ragansky v. U.S.*, 253 F., at p. 645, "incites the hostile and evil-minded", *U.S. v. Stickrath*, 242 F., at p. 153, is "calculated to inflame or have a sinister influence upon the minds of others", *U.S. v. Stobo*, 251 F. 689, 695 (D.C. Del. 1918), and is of "such a nature as to create or tend to create sedition or disloyalty or to stir up violence toward or resistance to the lawful authority of the President", *U.S. v. Stobo*, 251 F., at p. 695, "and . . . thus, to some extent, endangers the President's life." *Ragansky v. United States*, 253 F., at p. 645.[27]

The difficulty with the *Ragansky* test is that it, like the fear from which it emanates, is too superficial, too simplistic to adequately resolve the difficult Constitutional questions which it focuses upon. Under the *Ragansky* test, criminal liability is determined solely upon the use of speech, upon the fact of communication alone. Yet the character of this fact can only be determined after careful consideration of the circumstances in which it was made. *Schenck v. United States*, 249 U.S. 47, 39 Sup. Ct. 247, 248 (1919). Obviously, what otherwise might appear to be a classifiable type of utterance, may appear in a multitude of circumstances, limited only by the possible number of exchanges between different peoples. The words may be chosen

[27]We note that the government's suggestion that petitioner's brief in chief centered on the incitement argument due to petitioner's belief that Section 871(a) is primarily directed at threats which would incite others to harm the President is totally in error. (See U.S. brief, p. 20). As shown at Pet. brief, p. 29-34, it was the government's concern for the "devilment" theory that directly led to the enunciation of the *Ragansky* test.

after deliberation for their emotive, as well as their cognitive force; or be voiced spontaneously from the surface of thought, the raw material to be tempered by discussion and debate in order to form a more enlightened citizenry. In either case, the individual exercise of the Constitutional privilege of free speech is as fully protected by the First and Fifth Amendments as if the speaker's name had been specifically mentioned in the Constitution itself. Just as Section 871 (a) cannot be applied to sophisticated euphemism and punish political philosophy once expressed, *Watts v. United States*, supra, nor can it be applied to political hyperbole and punish a thoughtless selection of words, which, in context, intends and accomplishes nothing more than a verbal reprimand of the President. To endorse the *Ragansky* test is to endorse the facile assumption that government can forever forbid particular configurations of words without unnecessarily intruding on First Amendment freedoms, and running a substantial risk of suppressing ideas in the process. *Cohen v. California*, supra, 91 Sup. Ct., at p. 1788. As Justice Brennan correctly observes:

> "We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why 'wholly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York*, 333 U.S. 507, 528, 68 Sup. Ct. 665, 676, 92 L. Ed. 840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' *Organization*

for a Better Austin v. Keefe, 402 U.S. 415, 91 Sup. Ct. 1575, 29 L. Ed. 2d 1 (1971)" *Cohen v. California*, supra, 91 Sup. Ct., at p. 1788.

The question before us then is whether petitioner forfeited his Constitutional protections by including within his criticisms language compassing the violent end of the President of the United States. In deciding the question, we are compelled by neither precedent nor policy to accord any more weight to the epithet "threat" than to the other mere labels of law. Like insurrection (*Herndon v. Lowry*, 301 U.S. 242, 57 Sup. Ct. 732), contempt (*Bridges v. California*, 314 U.S. 252, 62 Sup. Ct. 190; *Pennekamp v. Florida*, 328 U.S. 331, 66 Sup. Ct. 1029), advocacy of unlawful acts (*DeJonge v. Oregon*, 299 U.S. 353, 57 Sup. Ct. 255), obscenity (*Roth v. United States*, 354 U.S. 476, 77 Sup. Ct. 1304; *Memoirs v. Massachusetts*, 383 U.S. 413, 86 Sup. Ct. 975; *Miller v. California*, 413 U.S. 15, 93 Sup. Ct. 2607), solicitation of legal business (*NAACP v. Button*, 371 U.S. 415, 83 Sup. Ct. 328), libel (*New York Times Company v. Sullivan*, 376 U.S. 254, 84 Sup. Ct. 710) and the various other formula for the repression of free speech, "threat" can claim no talismanic immunity from Constitutional limitations. It must be measured by standards to satisfy that First Amendment. *New York Times Company v. Sullivan*, supra, 84 Sup. Ct., at p. 720. See *Watts v. United States*, supra, 89 Sup. Ct., at p. 1401.

Perhaps, here, a word about that great amendment. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of an authoritative selection. To many this is,

and always will be, folly; though we have staked upon it our all." *U.S. v. Associated Press*, 52 F. Supp. 362, 372 (1943). But the First Amendment was enacted not only to preserve the good contained within a minority viewpoint, or which necessarily results from the public discussion of such a viewpoint, but also upon the firmly held belief that liberty is, in the final analysis, the means as well as the end. Mr. Justice Brandeis gave the principle its classic formulation in *Whitney v. California*, 274 U.S. 357, 47 Sup. Ct. 641, 648 (1927):

> "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks which all humanist institutions are subject. But they knew that order could not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worse form. Recognizing the occasional tyrranies of governing authorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Finally, the First Amendment is to be interpreted with the broadest scope possible in a liberty loving society. We note that the obvious corollaries are applicable:

> "The Constitutional guarantees of freedom of speech (forbids government from punishing) the

use of words or language not within 'narrowly limited classes of speech.' *Chaplinsky v. New Hampshire*, supra, 62 Sup. Ct., at p. 769. Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn,' *Speiser v. Randall*, supra, 78 Sup. Ct., at p. 1342, 'in every case the power to regulate must be so exercised as not, in attaining a permissable end, unduly to infringe the protected freedom,' *Cantwell v. Connecticut*, supra, 60 Sup. Ct., at p. 903. In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' *NAACP v. Button*, supra, 83 Sup. Ct., at p. 338." *Gooding v. Wilson*, supra, 92 Sup. Ct., at p. 1103, 1106.

The danger inherent in the *Ragansky* test is the purposeless manner in which it goes about its business. It proceeds on the belief that particular configurations of words have a universal meaning and effect, and punishes without reference to the intent of the speaker or the effect of the utterance in question. Indeed, the *Ragansky* test presumes both the crime and the guilt, and, unmindful of the purpose of Section 871 (a), exacts its toll from any and all who would, for even the briefest moment, exceed the limits it places on political discussion and debate. We submit that the *Ragansky* test is Constitutionally deficient in the limited scope of its inquiry. Due to its lack of concern for the intent of the speaker, the actual effect of the utterance in question, and the purpose of the statute it implements,

the *Ragansky* test indiscriminately bears upon innocent as well as knowing activity. The activity it capriciously selects for punishment is the use of speech intended solely, insofar as the offered proof discloses, to communicate thoughts to those whom the speaker was addressing. Such an approach violates both the First and Fifth Amendments of the United States Constitution. See *Dennis v. United States*, supra; *Wieman v. Updegraff*, supra; *Speiser v. Randall*, supra; *New York Times Company v. Sullivan*, supra; *Watts v. United States*, supra; *Cohen v. California*, supra; and *Gooding v. Wilson*, supra.

We submit as an alternative a test which was devised in 1919 and has been called upon many times since to resolve difficult First Amendment cases. The scope of its inquiry is determined by the facts at hand, and not by the fears and preconceptions of organized government. The clear and present danger test is, in effect, "an adjuration that the Court carefully inspect the conduct of a particular complainant to see whether under the circumstances" the facts were such as to call for the application of the statute in question. *The First Amendment Overbreadth Doctrine*, 83 Harvard Law Review 844, 888-889. In so doing it correctly rejects any suggestion that the enactment of the statute establishes the facts which are in each case essential to its validity. *Whitney v. California*, supra, 47 Sup. Ct. at p. 648. It is a necessary reminder that the presumption is one of innocence and favors the defendant, while the burden is one of proof, and falls, as it must, on the government.

Furthermore, we perceive no basis for rejection of the test on the grounds that the intent of the speaker will at times become the subject of examination. Here,

we might observe that it has been some time since the law viewed itself as impotent to explore the actual state of a man's mind.[28] *Smith v. California*, 361 U.S. 147, 80 Sup. Ct. 215 (1959). Indeed, as then Chief Justice Vinson noted in *Dennis v. United States*, supra, 71 Sup. Ct., at p. 862: "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." Cf. *Winters v. New York*, 333 U.S. 507, 68 Sup. Ct. 665 (1948).

Insofar as Section 871 (a) is concerned we submit that the First and Fifth Amendments require proof that the conduct of the defendant was, in some meaningful (true) sense of the statute, directed towards the President of the United States. We need not here consider the varieties of evidence which might be offered to establish such direction, for no such evidence has been introduced. We would note however that such an approach would not, as suggested by the government, immunize the bluff, the false alarm, or the purposeful hoax. U.S. brief, p. 10, 14, 15. Indeed, in the majority of the cases which might fall within this latter category, no serious free speech issues would be presented. Cf. *Roy v. United States*, 416 F.2d 874, 879 (9th Cir., 1967) (Pet. brief, p. 41-42).

Finally, we should note that apologies (U.S. brief, p. 24) for a jury's misapplication of a difficult Constitutional standard is "no substitute for facing up to tough individual problems of Constitutional (adjudication)", *Jacobellis v. Ohio*, 378 U.S. 184, 84 Sup. Ct. 1676, 1678 (1964), and is impermissible when the only evidence offered to establish the violation of a criminal

[28] *Pound, The Role of the Will in Law*, 68 Harvard Law Review 1.

law is proof of activity, which, except in "certain well-defined and narrowly limited circumstances", is protected by the First Amendment. *Dennis v. United States*, supra; *Edwards v. South Carolina*, 372 U.S. 229, 83 Sup. Ct. 680 (1963); *Cox v. Louisiana*, 379 U.S. 536, 85 Sup. Ct. 453 (1965). In cases where the question is raised if a person has trespassed across the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed and punished, the Court must examine for itself the statements in issue and circumstances under which they were made to see whether they were of a character which the principles of the First Amendment protect. *Speiser v. Randall*, supra; *Pennekamp v. Florida*, supra; *New York Times Company v. Sullivan*, supra.

II.

We feel that we have covered much in Part I which was originally outlined to be included in Part II of this reply. Therefore, in the interest of time, we will limit further discussion to the new "legislative purpose" offered by the government in support of their argument that Section 871 should continue to be applied under principles of strict criminal liability.

Our discussion must again begin with an examination of the early history of the statute. We submit it is obvious that the fear of the effect of words on those who hear them, though the listeners are in no way connected with the President of the United States (except by the ballot box), led to the broad interpretation of Section 871 enunciated in *United States v. Stickrath*, 343 F. 151 (1917) (See Pet. brief,

p. 29); guided the Court in its statement of the essential elements of the crime in *United States v. Stobo*, 251 F. 689 (1918) (Pet. brief, p. 31); and inevitably resulted in the formulation of the historical test in *Ragansky v. United States*, 253 F. 643 (1918) (Pet. brief, p. 32). Obviously, petitioner's considerable discussion of the incitement argument in his brief in chief was not motivated by petitioner's belief "that the primary purpose of Section 871 is to prevent incitement to harm the President," U.S. brief, p. 26, nt. 19, but as a long-awaited reply to this antiquated test. We are happy to note our success in that the government today withdraws its own support for the anachronistic "devilment theory".

Recognizing that unless it is buttressed the *Ragansky* test must fall with the illogical premise upon which it historically rests, the government now offers the following argument:

> "A 'true threat' is punishable, not primarily because it may incite others, but because the utterance itself produces an evil that Congress may prohibit. Such a declaration demands investigation by those charged with the security of the President, thereby diverting their resources and, in the process, tending to restrict Presidential activities." U.S. brief, p. 22.

Almost as an answer to its own questions, the government immediately notes that today the President would not be aware of any but the most serious threats, and certainly would not be coerced or restricted in the performance of his duty, except in instances of the most flagrant violations of the statute. U.S. brief, p. 22, nt. 21. Instances which we have previously pointed out would probably not present serious First Amendment issues.

After careful examination of the United States brief it becomes quite obvious that the Statute envisioned by the government is (or, more accurately, if enacted would be) more for the preservation of the federal resources than for the actual protection of the President of the United States. See U.S. brief, p. 15, 16, 22, 25. We can only reply that if this case can be said to be an example of how the new "legislative purpose" would safeguard federal resources we would call for its invalidation as much on the grounds of its inutility as for its Constitutional deficiencies. However, since we are here today to discuss the valid Congressional purpose of protecting the President, we will confine our discussion to this "overwhelming interest". U.S. brief, p. 15.

We find it most difficult to accurately appraise the new legislative purpose on the basis of the evidence before us. The government states that they were "informed by the Secret Service that when information concerning a threat to the President is received, the following procedure is normally followed: 1) Secret Service records are checked to determine if the individual involved is the subject of a previous report; 2) attempts are made to locate and interview the individual and other persons who may be able to provide information about the individual; 3) records of other law enforcement agencies are checked to determine if they contain information that may be helpful in evaluating the threat." U.S. brief, p. 16, nt. 12. Presumably this information was offered in support of the conclusions which the government states were drawn by the Warren Commission. At U.S. brief, p. 16-17, we find the following:

> "Indeed, the 'Warren Commission Report', in discussing the difficulties involved in the protection of the President, specifically noted that 'crank' threats had the deleterious effect of diverting the resources of the Secret Service. Id. at 428-432."

At the government's behest, we examined *The Report of the President's Commission on the Assassination of President Kennedy* (the "Warren Commission Report"), pp. 425-469 (1964). While we find it illuminating, we submit that it is not conclusive as to the necessary and proper scope of police action to protect the Chief Executive. More importantly, we find that the actual conclusions expressed by the Commission with reference to "crank" threats are directly contrary to those reported in the government's brief. The "Warren Commission Report" states at p. 432: "(The Secret Service) efforts appear to have been too largely directed at the 'crank' threat." We would therefore submit that the interpretation of Section 871 offered by the Government herein would tend more to unnecessarily divert the federal resources than any of the utterances which may have been made by this "puny anonymite".

We further submit that the "Warren Commission Report" should be reserved for the use for which it was intended, that is, as a recommendation to legislative and administrative officials, and not as an argument to be presented before this Court on final review of a particular case. The Commission Report is, at best, a compilation of statistics which must be further substantiated, weighed and debated before any conclusions could possibly be drawn as to their ultimate meaning. We submit that only after these legislative

details are fully and adequately observed could anyone properly balance the interest of the Government in punishing an unintended infraction of the Statute which causes only the most rudimentary police investigation, against the compelling needs which cause an individual to express an obviously unpopular opinion. It logically follows from the government's argument that every act of man that causes police investigation is punishable, if not for completion of the statutory crime, then for causing the efforts which result in the conclusion that he has committed no offense.

Finally, we should note that if there was included with the "Warren Commission Report" any language which might conceivably have been directed to the Judiciary, it would be the following:

> "The protection of the President must be thorough but inconspicuous to avoid even the suggestion of a garrison state. The rights of private individuals must not be infringed. If the protective job is well done, its performance will be evident only in the unexceptional fact of its success." *The Report of the President's Commission on the Assassination of President Kennedy*, p. 427.

III.

Petitioner admits there are difficult moments in close First Amendment cases when one might simply argue that the lofty ideals expressed by this Court cannot be pragmatically applied to the utterance in question. We submit however that this is a conclusion which cannot be reached without careful consideration of the context in which the utterance was made. Words do not have

the universal meaning or effect the government herein suggests. Therefore, a criminal law which would punish a user of speech may only be applied if the use in question was within the constitutional limits of the statute.

Petitioner also admits that at first glance no one would suppose that Section 871 was overly broad at the time it was enacted. However it appears before us today inextricably bound with the *Ragansky* test, an overly broad construction susceptible of sweeping and improper application. Indeed, the "chilling effect" which we early perceived to be a necessary adjunct to the District and Appellate Court decisions in this case has unfortunately already borne its poisonous fruit. The government has offered, in support of its argument, an incomplete compilation of statistics gathered for an entirely different purpose. Statistics which we might add favor rather than disfavor petitioner's argument. We offer, as an Appendix to this brief, an incontrovertible fact—an editorial printed in the *Philadelphia Evening Bulletin* on November 1, 1974. (We have been advised by the Bulletin's circulation department that this newspaper has a daily circulation in excess of 600,000.) An editorial which can only be construed as an immediate warning to those who find it necessary to criticize the President and his policies, and yet lack the emotional maturity, or, perhaps even the eloquence, to voice their criticisms with perfect good taste. Obviously, the mere fact of the reporting of the lower courts' decisions in this case has already begun the imperceptible process of erosion from which this Court has so urgently sought to protect the First Amendment freedoms. Some may attempt to characterize the incursion as slight, and others will undoubtedly argue

that since it will most often come to bear on the emotionally immature, or the least educated and least capable of our citizenry, the ideas which will be suppressed are such an insignificant step to the truth as to be clearly outweighed by the desire for social order. We think these arguments are indefensible when no benefit, within the intention of the statute, can reasonably be anticipated.

Perhaps we can best be of service to the Court in its formulation of a rule of excision that is both sufficiently determinant and sufficiently protective by making the following observations immediately available:

> "First, the rule should not confine its focus to the expressive quality of conduct, for otherwise it will likely fail to excise applications which are impermissible more because of the minimal harm done than because of the value of the expressive conduct at issue. Second, to be sufficiently protective and at the same time to avoid putting all the myriad harms and expressive qualities into the balance, the rule should elevate to per se status a few specific features of conduct which usually but not always justify a holding of privilege under traditional as applied adjudication. An adequate rule of privilege, that is, must usually be somewhat overprotective of First Amendment interest in order to avoid underprotecting them." 83 Harvard Law Review, at p. 890.

Our own recommendations are two-fold. First, we would submit that prosecutions under Section 871 (a) for alleged threats which are part and parcel of the communication of ideas, particularly political ideas, should proceed to trial only upon allegations expressly set forth in the indictment as to the specific harm thought

to be produced by the utterance. We would hope that no man should again be called to defend against the wide range of supposed evils which might be conjured up by an imaginative prosecutor. We think such a requirement would do more towards making the government review its evidence, in light of the statute, than any possible formulation which we might here address to the particular facts of this case. However, attending, as we must, to the circumstances herein, we respectfully submit:

Conclusion:

When an alleged verbal threat which involves the communication of ideas is thought to coerce or restrain the President in the performance of his duties, a conviction under Section 871 (a) can be sustained only if:

(1) In the context and under the circumstances the statement unambiguously constituted a true threat upon the life or safety of the President;

(2) The speaker had the specific intent that his utterance be immediately communicated to the President of the United States; and

(3) The threat was of such a nature as would lead a reasonable man to fear for his own safety and well-being.

We conclude by noting that if more than this is necessary for the protection of the President, "it is the legislature's job to identify features of conduct which

do sufficient harm to governmental interests to warrant intervention." See 83 Harvard Law Review, at p. 890.

Respectfully submitted,

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APPENDIX A

The Evening Bulletin Focus

A FRIDAY, NOVEMBER 1, 1974 9

Rose DeWolf

Idle Threats And a Real Punishment

DID YOU KNOW there is a Federal law that says you can be thrown in jail for five years for "threatening bodily harm" to the President or Vice President of the United States — even if you have no intention of carrying that threat out?

George Herman Rogers found out the hard way.

On the morning of March 24, 1972, George Herman Rogers, a chronic drinker, was drunk. And at 6 A.M. he came into the Holiday Inn Restaurant in Shreveport, La., for a sobering cup of coffee.

Along with the coffee, he wanted some conversation. So he tried to draw some of the waitresses and nearby patrons into a discussion of then-President Nixon's trip to Red China the previous month. Rogers was upset about that trip. In his view, the President of the U.S. had no business consorting with commies. Rogers railed on a bit — ending with: "I'm going to Washington to whip the a-- off Nixon!"

The people in the restaurant tried hard to ignore Rogers, but he refused to ignore them. He repeated his remarks a couple more times — "goin' to beat him up." Blankety-blank.

NO ONE of the waitresses called the police to ask them to evict this loudmouth before the restaurant really got busy. A police officer arrived and asked Rogers what he'd said. Obviously delighted finally finding a willing audience, Rogers told him.

In the words of Brad Clinkenbeard, one of Rogers' court-appointed lawyers, Rogers talked to the policeman "adding nothing to his earlier statements, and, unfortunately, leaving nothing out either." Rogers was then taken to the police station where he obligingly repeated it all again.

Shortly thereafter, he was arrested on five counts (three times in the restaurant, twice to police) of threatening the President. He was tried in Federal Court and found guilty by a jury. The jury recommended that the judge exercise "extreme mercy" in passing sentence. The judge gave Rogers five years in jail on one count (he's still there) and five additional years of probation on the other counts.

(If that's "extreme" mercy, you have to wonder what this judge would consider "ordinary" mercy — the rack, maybe.)

The reason I bring this story up is that the U.S. Supreme Court has just agreed to review Rogers' conviction. His attorneys have asked the Court to rule on whether the kind of threat Rogers uttered — i.e. one made in the course of a drunken political diatribe — is really a meaningful — and therefore illegal — threat.

Rogers was not an assassin whose lips had got loosed, but a simple barfly who got hippy when juiced.

I CAN'T WAIT to hear how the Supreme Court decides this one. For the sake of barroom loudmouths everywhere, I hope the justices are sympathetic to George Herman Rogers.

I don't claim that a threat should never be taken seriously. Some are meant seriously. There have been a dozen or so Philadelphia-area people who have been arrested under this same law. But I have never written about them. Because all the ones I know about either called the White House directly to make their threat or wrote a letter to the FBI. That kind of cluck is asking to be arrested.

But there are a lot of emotional-types around who get into heated political debates and think the President deserves "a punch in the nose" or "a kick in the pants" for some policy or other — and who offer to deliver it — who really wouldn't cast anything more dangerous than a vote.

If this law stands, then the least Congress should do is require every tap-room to post some kind of warning, like: Caution: threatening the President can be hazardous to yourself.

(Rose DeWolf's opinion column appears next on Monday.)